90-1328

NO. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

GRAFF TRUCKING COMPANY, INC.,

Petitioner,

vs.

FRANK J. KELLEY, Attorney General of the State of Michigan;
WILLIAM E. LONG, Chairperson of the Michigan Public Service Commission;
STEVEN M. FETTER, Commissioner of the Michigan Public Service Commission;
RONALD E. RUSSELL, Commissioner of the Michigan Public Service Commission;
and Captain ANTHONY PHILIPPS, Commander of the Motor Carrier Division of the Michigan State Police,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is the "bad faith" exception to the *Younger* doctrine established, where a state has utilized a variety of procedural tactics in both the state and federal courts, to prevent a ruling on the constitutionality of a state statute under the U.S. Constitution Commerce Clause and Supremacy Clause?

2. Is the "bad faith" exception to the *Younger* doctrine established, when a state continues to enforce a state statute against Petitioner and prosecute an action against Petitioner before a state administrative agency, after a state court in a criminal proceeding has found the state statute in question to be unconstitutional, under the U.S. Constitution, and dismissed charges against Petitioner?

3. Is *Younger* abstention inappropriate, where no vital state interest has been established or is involved?

PARTIES

PETITIONER

1) Graff Trucking Company, Inc.*

RESPONDENTS

1) Frank J. Kelley, Attorney General of the State of Michigan
2) William E. Long, Chairperson of the Michigan Public Service Commission
3) Steven M. Fetter, Commissioner of the Michigan Public Service Commission
4) Ronald E. Russell, Commissioner of the Michigan Public Service Commission
5) Captain Anthony Philipps, Commander of the Motor Carrier Division of the Michigan State Police

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* Graff Trucking Company, Inc., a Michigan corporation, has no parent or subsidiary corporations.

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IN THE

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OCTOBER TERM, 1990

NO. _____

GRAFF TRUCKING COMPANY, INC.,

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vs.

FRANK J. KELLEY, Attorney General of the State of Michigan;
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STEVEN M. FETTER, Commissioner of the Michigan Public Service Commission;
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and Captain ANTHONY PHILIPPS, Commander of the Motor Carrier Division of the Michigan State Police,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner Graff Trucking Company, Inc. respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals below (Appendix A, *infra*, p. 1a) denying the appeal of Petitioner is unreported. The opinion of the District Court below (Appendix B, *infra*, p. 3a) dismissing Petitioner's action is unreported. The opinion of the District Court below (Appendix C, *infra*, p. 9a) denying Petitioner's request for rehearing is unreported. The Court of Appeals below issued three subsequent orders, first denying Petitioner's request for rehearing (Appendix D, *infra*, p. 12a), then vacating that order (Appendix E, *infra*, p. 13a), and ultimately denying Petitioner's request for rehearing (Appendix F, *infra*, p. 14a), all of which are unreported.

JURISDICTION

The opinion of the Court of Appeals below (Appendix A, *infra*, p. 1a) was filed on August 31, 1990. Rehearing was sought and denied by ultimate order of the Court of Appeals filed on November 19, 1990 (Appendix E, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The federal constitutional provisions involved are two. The first is the Commerce Clause, U.S. Const., Art. I, Sec. 8, Cl. 3, which states:

> The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.

The other constitutional provision involved is the Supremacy Clause, U.S. Const., Art. VI, Cl. 2, which states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all

Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

STATEMENT OF THE CASE

A. Statement of the Facts

Petitioner Graff Trucking Company, Inc. (Graff) is a for-hire motor carrier, based in Kalamazoo, Michigan. It operates as a common and contract carrier, pursuant to authority granted to it by the Interstate Commerce Commission in Docket No. MC-205269 to transport general commodities between all points in the contiguous 48 states. Ninety percent of Graff's revenues are derived from operations in interstate commerce. The remaining ten percent of Graff's revenues are derived from operations in Michigan intrastate commerce, pursuant to authority held by Graff from the Michigan Public Service Commission (MPSC).

In order to conduct its trucking operation, Graff obtains a portion of its power equipment from owner-operators. These owner-operators lease the power unit, or tractor, to Graff for use by Graff in pulling trailers owned by Graff or leased by it from other sources. This equipment is then used to transport freight for customers of Graff.

Graff maintains an unincorporated operating division, known as the "Indiana" Division. Graff's Indiana Division is based at White Pigeon, Michigan, in southern Michigan close to the Indiana border.

Graff treats the owner-operators of its Indiana Division as independent contractors. Graff has always treated those owner-operators as independent contractors, in terms of its dealings with those individuals. Those owner-operators conduct trucking operations chiefly in interstate commerce, with, once again, about 90% of the drivers' operations involving interstate commerce, as is the case of Graff's operations overall. The other 10% of the time, the drivers of the Indiana Division conduct operations in Michigan intrastate commerce. The Interstate Commerce Commission allows motor carriers to treat their owner-operators as independent contractors, and has allowed such treatment historically.

In 1986, Graff began receiving from Staff of the MPSC letters informing Graff that its leases for motor carrier equipment on file with the Michigan Public Service Commission were in violation of a state statutory provision, MCL 479.10a(6), which provision requires that drivers of leased equipment, i.e., the owner-operators, be treated by the motor carrier as employees. Commencing in the summer of 1988, Officer Rodney B. Krietemeyer of the Motor Carrier Division of the Michigan State Police visited Graff's offices, and directed Graff to bring its operations into compliance with MCL 479.10a(6). These visits began at the same time that the MPSC published in its *Bi-Weekly Information Bulletin* a notice of a moratorium on enforcement of MCL 479.10a(6), while a study of enforcement of that provision was under review. The MPSC then notified carriers, through another notice in its *Information Bulletin*, that enforcement would commence on October 20, 1988, and there would be no exemptions, based on the incidental nature of intrastate operations conducted in relation to interstate operations. The state police officer's visits continued into the spring of 1989. The officer continued to instruct Graff to bring its operations into compliance, and threatened enforcement action.

On May 2, 1989, a complaint was filed by Graff in the U.S. District Court for the Western District of Michigan, seeking a judgment that the Michigan state statutory provision be declared null and void, as violative of the Commerce Clause and Supremacy Clause of the U.S. Constitution. On May 4, 1989, Officer Krietemeyer issued 14 misdemeanor citations against Graff, alleging violations of the state statutory provision requiring Graff to treat its drivers of leased equipment as employees. On May 22, 1989, Staff of the Michigan Public Service Commission filed a formal complaint with the MPSC against Graff, seeking a cease and desist order against Graff, monetary fines, and the revocation of Graff's intrastate operating authority, as well as other relief, because of the violations by Graff of MCL 479.10a(6). One of the admitted purposes of the filing of the formal administrative proceeding against Graff, according to Mr. Thomas Lonergan, the Direc-

tor of the Motor Carrier Regulation Division, was to avoid federal court jurisdiction.

Respondents answered the federal court complaint, based on the abstention doctrine as set forth in *Younger* v. *Harris*, 401 U.S. 37; 91 S.Ct. 746; 27 L.Ed.2d 669 (1971), as well as other grounds[1]. The U.S. District Court dismissed the action filed by Graff in federal court, based on *Younger*, *supra*, as there were two pending state proceedings against Graff[2].

While Graff was pursuing its appeal from the dismissal to the U.S. Court of Appeals, Graff presented and argued a Motion to Dismiss the state criminal charges against it, in the 3-2 Michigan Judicial District Court in Centreville, Michigan. By bench opinion issued on June 20, 1990, (see Appendix G, *infra*, p. 15a), and order entered on June 27, 1990, (see Appendix H, *infra*, p. 18a), the state district court dismissed the criminal charges, finding that the Michigan statute was repugnant to the Commerce Clause of the U.S. Constitution. The state did not appeal that judgment to the state circuit court, as the state had a right to do.

The MPSC continued to pursue enforcement against Graff in its administrative proceeding before the MPSC. Hearings in that cause were completed in April, 1990, the case was briefed, and the matter is awaiting the issuance of a proposal for decision by the Administrative Law Judge[3]. Respondents

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[1] Respondents also argued for dismissal based on such cases as *Burford* v. *Sun Oil Co.*, 319 U.S. 315; 63 S.Ct. 1098; 87 L.Ed.2d 1424 (1943), reh. den. 320 U.S. 214; 63 S.Ct. 1442; 87 L.Ed.2d 1851, and *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496; 61 S.Ct. 643; 85 L.Ed.2d 971 (1941).

[2] These two proceedings were the state criminal proceeding, *People* v. *Graff Trucking, Indiana Division*, District Court No. 89-1137-1-ST (3-2 Judicial District), and the MPSC administrative proceeding *In the Matter of the Complaint Against Graff Trucking Company, Inc. Filed by the Michigan Public Service Commission Staff*, MPSC File No. T-1075.

[3] Under the Michigan Administrative Procedures Act, MCL 24.201, *et seq.*, the proposal for decision of a hearing officer can be appealed by any aggrieved party to the Commissioners themselves, pursuant to MCL 24.281.

continue to enforce actively MCL 479.10a(6) against Graff, as well as other carriers.

There has been a succession of attempts by carriers to obtain rulings from the state courts that this provision is unconstitutional since the beginning of 1988. (See Appendix I, *infra*, p. 20a, which charts these cases). Respondents, represented by the Attorney General, have succeeded in avoiding a decision on the merits in any of these court challenges, with the exception of state criminal proceedings. However, in *Graff* as well as in the two other criminal proceedings, prosecutions have been dismissed without appeal by the State of Michigan.

In *People of the State of Michigan* v. *CTX Division of Central Transport, Inc.*, District Court No. C-88-0736—C-88-0762, 34th Judicial District (April 26, 1989), (Appendix J, *infra*, p. 23a), for example, all 25 citations pending against the defendant carrier were dismissed, when the only matter before the court was a motion by defendant raising the same constitutional grounds which have been raised by Graff in this proceeding. That dismissal was not appealed by the State. In *People of the State of Michigan* v. *ABC Cartage Company*, District Court No. 89-002118, 52-3 Judicial District (May 15, 1990), (Appendix K, *infra*, p. 26a), an action was dismissed against a carrier for violation of MCL 479.10a(6), on an independent ground — that the statute did not require employment, in the manner interpreted by the MPSC. That decision was not appealed by the State either.

Other civil actions brought by carriers in the state courts however, have fallen to Respondents' procedural attacks. For example, the district court judge in the *CTX* proceeding, *supra*, first suggested that the defendant carrier file an action in state circuit court seeking a declaratory judgment while the criminal matters were held in abeyance. Defendant and the prosecutor stipulated to this process, and the judge signed an order to that effect (Appendix L, *infra*, p. 28a). An action was then commenced in Wayne County Circuit Court, entitled *Central Transport, Inc. and its CTX Division* v. *State*

of Michigan and the Michigan Public Service Commission, Wayne County Circuit Court No. 88-816850-CZ. By opinion dated March 22, 1989 (See Appendix M, *infra*, p. 31a), however, defendants' Motion to Dismiss was granted, based on the ground that the matter was already pending before a court of competent jurisdiction. This was in spite of the order of the district court judge and the stipulation of the prosecutor which had approved the filing of such an action. It was only after this circuit court opinion and a request by Defendant that its Motion to Dismiss was ripe for decision (see Appendix N, *infra*, p. 35a) that the state district court dismissed the citations, without appeal by the State.

On September 22, 1989, still another action was commenced in the circuit court, in *Universal Am-Can, Ltd.* v. *Frank J. Kelley, et al.*, Macomb County Circuit Court No. 89-3884-AW, seeking a declaratory ruling that the statute in question was unconstitutional. These same Respondents again filed a motion to dismiss, arguing, among other grounds, that plaintiff had failed to exhaust its administrative remedies, despite already existing MPSC decisions that it did not have the power to rule its own enabling statute unconstitutional, as *In the Matter of the Application of Central Transport, Inc.*, File No. C-6714, Case No. 60 (January 9, 1990) (see excerpt at Appendix O, *infra*, p. 38a). The circuit court judge, on January 19, 1990, dismissed the action in *Universal*, based on its failure to exhaust its administrative remedies (see Appendix P, *infra*, p. 40a). Universal's motion for rehearing was denied (see Appendix Q, *infra*, p. 43a), and that matter is presently pending on appeal, before the Michigan Court of Appeals[4]. The issue on appeal in that case involves the propriety of dismissal of the action, on exhaustion grounds, and not the merits of the constitutional challenge to MCL 479.10a(6).

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[4] That appeal has been docketed as Court of Appeals Docket No. 127145.

B. History of Proceedings and Basis for Federal Jurisdiction

As this case involves the issue of whether Respondents' action in defeating federal court jurisdiction in this case comes within the "bad faith" exception of *Younger*, various facts concerning the prior proceeding have been set out in the preceding discussion. A brief synopsis will be repeated here.

Graff filed its complaint with the U.S. District Court for the Western District of Michigan on May 2, 1989, when no state court proceedings were pending against it. Two days later, criminal citations were issued against Graff in state district court. Twenty days later, a formal complaint was commenced against Graff by Staff of the MPSC, in File No. T-1075. Respondents moved to dismiss the U.S. District Court action, based on *Younger* and two pending state proceedings in both state district court and before the administrative agency. The U.S. District Court granted the Motion to Dismiss on *Younger* grounds on August 18, 1989, and denied Graff's Motion for Rehearing on October 16, 1989. Graff appealed to the U.S. Court of Appeals for the Sixth Circuit.

The criminal charges against Graff were dismissed by the state district court, by bench opinion rendered June 20, 1990 and order issued June 27, 1990. That decision was not appealed by the People.

On August 31, 1990, the panel of the Sixth Circuit issued its decision affirming the U.S. District Court decision. Graff filed a petition for rehearing. Respondents were directed by the Court of Appeals to file a response. On November 6, 1990, the Court of Appeals issued an order denying the Petition for Rehearing. On November 8, 1990, the Court of Appeals issued an order vacating the November 6, 1990 order, indicating that it had been issued inadvertently. On November 19, 1990 still another order was issued denying the petition for rehearing. The administrative proceeding is still pending at the MPSC.

The underlying basis of Graff's federal court action is that a provision in the Michigan Motor Carrier Act, MCL 479.10a(6) which requires trucking companies to treat their owner-operators as employees, is unconstitutional under the Commerce Clause and Supremacy Clause. Trucking companies have traditionally regarded their owner-operators as independent contractors. The Interstate Commerce Commission specifically authorizes the maintenance of owner-operator status, and has done so historically. The ICC has promulgated extensive rules at 49 C.F.R. 1057.11-12 governing the relation between owner-operators and motor carriers, but nowhere requires an employee status. Graff's operations are heavily centered in interstate commerce. To treat an owner-operator as an employee involves substantially higher labor costs. Graff must compete in interstate commerce with carriers which do not have this same obligation. Graff maintains the Michigan statutory provision is an undue burden on interstate commerce. Further, it conflicts with federal regulatory treatment, which is supreme in all respects for carriers operating in interstate commerce, as Graff does.

The basis for federal jurisdiction in the court of the first instance is 28 U.S.C. §§ 1331, 1343, 2201, and 2202, as the matter involves a federal constitutional challenge to a state statute.

REASONS FOR GRANTING THE WRIT

1. Prevent the Use of the *Younger* Doctrine as a Manipulative Device to Delay or Prevent the Resolution of Federal Constitutional Claims Involving State Statutes.

This case involves a critical question of federal-state relations, involving as it does the *Younger* abstention doctrine and the bad faith exception thereto. This Court has never decided whether *Younger* abstention is still appropriate, where a state has prevented judicial determination of a federal constitutional issue in not only the federal courts, but the state courts, through legal maneuvering. This Court has also never decided whether *Younger* abstention is appropriate, when a state criminal prosecution has been resolved in defendant's favor, based on lack of constitutionality of a state statute, but the state continues to enforce the statute against the party. These questions are worthy of decision by this Court.

In *Younger*, of course, this Court, based on the notion of "comity" and "our federalism," declared that there would be no federal court intervention with a pending state criminal prosecution, absent a showing of ". . . bad faith, harassment, or any other circumstance that would call for equitable relief". 401 U.S. at 34. The scope of the *Younger* abstention doctrine was expanded beyond pending state criminal prosecutions to civil enforcement proceedings in *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592; 95 S.Ct. 1200; 43 L.Ed.2d 482 (1975), where the application of a public nuisance statute to a theater displaying pornographic films was involved[5]. It was

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[5] See, also, in this same regard, *Trainor* v. *Hernandez*, 431 U.S. 434; 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977), involving a civil action by a state department seeking the return of welfare payments alleged to have been obtained fraudulently, and *Moore* v. *Sims*, 442 U.S. 415; 99 S.Ct. 2371; 60 L.Ed.2d 994 (1979), involving state child custody proceedings, in a case of suspected abuse. This court noted in *Trainor* that the option had been available to the state to prosecute the involved parties in criminal pro-

pointed out in *Huffman* that the proceeding was ". . . more akin to a criminal prosecution than are most civil cases" *Id.* at 604.

In *Hicks* v. *Miranda*, 422 U.S. 332; 97 S.Ct. 2281; 45 L.Ed.2d 223 (1975), *Younger* was also applied in a broader context, in that this Court held that the state proceedings did not have to be pending, at the time that the federal case was initiated. In the instant case involving Graff, of course, no state court proceedings were pending at the time that Graff filed its actions. *Hicks*, once again, involved obscenity charges. This court declared at 422 U.S. 349 that:

> . . . We now hold that where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger* v. *Harris* should apply in full force.

In the case at hand, there had been no proceedings of substance prior to the institution of the state court criminal proceeding, although some of the Respondents, at least had been served with Graff's U.S. District Court complaint[6].

Younger has been applied in still other contexts by this Court. For example, in *Middlesex County Ethics Committee* v. *Garden State Bar Association*, 457 U.S. 423; 102 S.Ct. 2515; 73 L.Ed.2d 116 (1982), *Younger* abstention was held appropriate, where a state bar disciplinary proceeding

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ceedings, but the state elected to vindicate its important state policies through the civil action. See 431 U.S. at 433. In *Moore*, this court emphasized that an action involving the removal of a child in child-abuse context was closely related to criminal statutes. See 442 U.S. at 423. Again, important state interests were involved.

[6] There were never actual hearings held on any of the issues involved in this case by the U.S. District Court. The matter was decided entirely on the written arguments of counsel.

judicial in nature and within the jurisdiction of the New Jersey Supreme Court had been commenced prior to the institution of the federal court complaint. Further, in *Ohio Civil Rights Commission* v. *Dayton Christian Schools, Inc.*, 477 U.S. 619; 106 S.Ct. 2718; 91 L.Ed.2d 512 (1986), *Younger* was applied to a prior pending proceeding involving a state administrative agency. The lower court, relying upon the two pending, but not prior, state court proceedings in the case at hand, found *Younger* abstention to be appropriate and dismissed Graff's claim without prejudice. In its Motion to Dismiss, Respondents had argued that:

> Plaintiff has state remedies which it may utilize and this issue is the subject of currently pending state district court and state administrative proceedings.

Respondents' Memorandum of Law in Support of Motion to Dismiss Complaint on Grounds of Abstention, p.12. Respondents relied upon both the state district court criminal proceeding and the administrative agency proceeding, as did the U.S. District Court in its opinion. In Respondents' Response to Graff's Motion for a New Trial in the U.S. District Court, Respondents stated, at p.19, as follows:

> Plaintiff argues (memo, p.13) that Defendants have evidenced bad faith and seek to avoid a hearing on the merits in this cause. In response, Defendants' urges (sic) that the state district court proceeding involving the 14 citations issued to Plaintiff was adjourned until December 1, 1989 pursuant to a request by Plaintiff. Thus, it was not the state who seeks to avoid litigating the merits of this case in the state district court proceedings. Rather, it is the Plaintiff who seeks to maneuver this case from the traditional state forums to the federal court.

Respondents further charged that:

> . . . Plaintiff will in all likelihood be attempting to

> persuade both the (state) district court judge, as well as the MPSC that proceedings on the merits in those state proceedings should await a final disposition of this case by the federal court. It is thus the Plaintiff who seeks to prolong and defer the litigation of these cases on the merits in the two pending state proceedings. *Id.*, at 20.

Petitioner had, in response to the initial *Younger* motion argued that the "bad faith" exception to *Younger* applied, and pointed out what had transpired already in *People* v. *CTX*, *supra* and *Central Transport, Inc., et al.* v. *State of Michigan, et al., supra.* Those matters were again presented to the district court, in Graff's Motion for Rehearing and Graff's Memorandum of Law in Support of Motion for New Trial (or Rehearing), at p.14, where the following prediction was made by Petitioner:

> In the event, of course, that the provision is found unconstitutional before a state district court, the people will have the election of not appealing that decision and trying their luck with another citation issued before another district court, claiming all the while that the adverse decision on constitutionality was an aberration and without precedential value in any other district. To allow Defendants to play this game is not, Plaintiff submits, in the interest of justice or fair play. These are extraordinary circumstances, also.

Yet, Graff's argument on bad faith was rejected by the trial court in its initial opinion, and not addressed in its decision on Graff's Motion for Rehearing.

When the arguments regarding the oppressive state tactics concerning both the state and federal challenges to the statutory provision in question were raised before the Court of Appeals, on both brief and oral argument, the court noted that it was ". . . limited to the record before us on appeal". (Appendix A, *infra*, p. 2a). Graff submits that the issue of

bad faith was properly before the U.S. District Court, as well as the Court of Appeals, and, further, that the courts can properly take notice of other court decisions and court pleadings, which proceedings continue to support Graff's contention that the State of Michigan has engaged in a legal war of attrition, for purposes of preserving enforcement of this statute as long as possible. This strategy of Respondents has been singularly successful, as a review of the events reveals. That strategy has been oppressive to Graff and has caused it incredible expense.

Petitioner is aware of no situation in which *Younger* abstention has been deemed appropriate, in a case such as this, where the state has declined to appeal dismissals of state criminal charges, based on federal constitutional challenges, while continuing to enforce the same state law. The State here has, further, utilized procedural arguments, such as exhaustion of administrative remedies, in *Universal*, *supra*, and the existence of another prior and competent state forum, in *Central Transport*, *supra*, to avoid decisions on the merits in state declaratory judgment actions brought in state courts. The state has an appeal by right to the circuit court, as does any other party, from a district court decision, pursuant to MCL 600.8342(1) and (3). Moreover, there is an appeal by application from such a circuit court decision to the Michigan Court of Appeals itself. Concerning the declaratory judgment actions which the State was successful in having dismissed, appeals from the circuit court decisions in those cases proceed directly to the Michigan Court of Appeals, pursuant to MCL 600.308[7]. Here, after Respondents expressly directed the U.S. District Court's attention to the state criminal proceeding, as

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[7] The declaratory judgment device was attacked by Respondents, despite the fact that the courts of Michigan have long favored its use to determine questions such as constitutionality. See, in that regard *Shavers* v. *Attorney General*, 402 Mich. 554, 588; 267 N.W.2d 72 (1978), wherein the court stated that "the declaratory judgment rule was intended and has been liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people."

an avenue which Graff had available in which to raise its constitutional arguments, and the U.S. District Court accepted Respondents' argument in that regard, dismissing on *Younger* grounds, Graff's arguments were presented to the state district court in the context of the criminal charges. Graff prevailed. Yet, Respondents have continued to enforce the statutory provision in question against Graff, as well as other carriers, and continues to prosecute the state administrative proceeding, requesting a variety of draconian relief, even including the assessment of fines[8]. As Justice Scalia, writing for the Court, recently pointed out in *New Orleans Public Service, Inc.* v. *Council of New Orleans*, 491 U.S. 350, 109 S.Ct 2506, 2512; 105 L.Ed.2d 298 (1989),

> Our cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred.

It was pointed out there, once again, that abstention is "the exception, not the rule". *Id.* at 2513. In its discussion, the Court again noted that the obligation of the federal courts to determine claims within their jurisdiction was "virtually unflagging", as had been stated in *Deakins* v. *Monaghan*, 484 U.S. 193, 203; 108 S.Ct. 523; 98 L.Ed.2d 529 (1988). The bad faith language of *Younger* must be given meaning in Graff's case, if the language of this Court in cases such as *New Orleans* and *Deakins* concerning the federal courts' obligation to rule on cases within their jurisdiction, is to have meaning. In this case, Graff, before the U.S. District Court, successfully predicted the course which Respondents would take, if Graff prevailed in the state district court proceeding. Graff said that such a state court ruling would mean nothing to Respondents. It has meant nothing.

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[8] Fines could have been assessed in the criminal proceeding, but were not, because of the state district court's disposition in *People* v. *Graff*, *supra*. Criminal violations of the Michigan Act are punishable by fines not exceeding $500 or imprisonment for not more than 90 days, pursuant to MCL 479.16.

It is true that, at the time that Petitioner filed its federal court action, it was aware of the continuing interests of State Police Officer Krietemeyer in Graff's method of treatment of owner-operators. Such interest had been expressed for several months. However, for a part of the time that Graff was being investigated, a moratorium by the MPSC was in effect. Also, Graff was aware that the *Central* declaratory judgment action, *supra*, was pending in Wayne County Circuit Court. After that action was dismissed, based on Respondents' motion, Graff concluded that it was necessary for it to file this federal court complaint. However, it is absurd to suggest, as Respondents have argued, that Graff should have known that a formal complaint proceeding would be instituted against it by the MPSC Staff. No formal complaint had ever been instituted by Staff against a carrier for violations of MCL 479.10a(6). The state police, further, issue a multitude of citations against motor carriers each and every year in Michigan for various and sundry Motor Carrier Act offenses, and only a small fraction of these ever result in formal complaint proceedings being instituted against the carrier. Also of note is the admission by Mr. Lonergan, Director of the MPSC Motor Carrier Regulation Staff, in the MPSC proceeding involving Graff, that one of Staff's motivations was to avoid a federal court determination of Graff's Commerce Clause and Supremacy Clause issues[9].

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[9] The following exchange occurred between Mr. Lonergan and Petitioner's counsel, during Mr. Lonergan's cross-examination in the administrative proceeding:

Q: Would I be correct that if I were to ask you questions about your personal knowledge with regard to the factual matters underlying the complaint, that you have not —

A: Very little.

Q: Was part of your reasons for filing the formal complaint against Graff to have available this Commission as a forum to present the factual issues as opposed to a federal court?

A: Yes, I would say it was desired, yes.

When the Court of Appeals below directed Respondents to file a response to Graff's Petition for Rehearing, Respondents, apparently out of a feeling of concern that their tactics might have caught up to them, represented to the Court of Appeals at Note 10, p. 5 of their response that:

> It should also be noted, however, that although the Defendants-Appellees do not recognize either of the three district court decisions as foreclosing or precluding any enforcement of MCL 479.10a(6), Defendants-Appellees have ceased any enforcement activity against any existing operations not in compliance with MCL 479.10a(6) during the pendency of the MPSC proceeding involving Graff and will continue to do so, at least until the Commission's order therein, and perhaps during any pending Court of Appeals review thereof.

A similar representation was made to the administrative law judge before the MPSC in a pleading filed with that agency. The purpose of the representation made by Respondents was to demonstrate to the Court of Appeals that they were not acting in "bad faith". Graff subsequently pointed out to the administrative law judge before the agency that Respondents continued to enforce the statute in question[10]. In response to Graff's charge that enforcement continued, Respondents replied as follows in the administrative proceeding:

> Clearly, Graff has not carefully read the statement contained in footnote 7 (footnote 8 of Respondents' pleading before the Court of Appeals) because that footnote expressly states that Staff has ceased enforce-

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[10] Citations were issued, for example, on October 16 and October 17, 1990 for related offenses in *People* v. *Universal Am-Can, Ltd.*, District Court Nos. 90-003143-ST and 90-003144-ST (52-3 Judicial District) which matters are presently pending before the district court on Motions to Dismiss, because of constitutionality grounds. Other enforcement actions continue to take place against existing carriers by Respondents.

> ment activity against any '*existing*' operations not in compliance with MCL 479.10a(6). Thus, the only enforcement activity that Staff is therefore taking would be in instances where a carrier seeks to augment or add to its illegal operations. In other words, if a carrier currently has 25 leases on file with the MPSC for vehicles it leases from owner-operators, the carrier is still able to renew and obtain decals for those vehicles on an annual basis, even if those leases do not comply with MCL 479.10a(6). However, if a carrier wishes to add more vehicles to its existing fleet, then the Staff has refused to issue decals if the leases that the carrier attempts to file are not in compliance with the Michigan Motor Carrier Act and rules.

This is but another example of Respondents' perfidy. A state which is engaged in this kind of behavior is not entitled to the respect for state functions declared in *Younger*. Involved in this case is the bad faith necessary to justify federal intervention. Involved is the harassment necesssary. Litigants should not be deprived of a federal court forum in which to hear their federal constitutional claims in cases such as this.

Younger elaborates on an important and vital theme in this nation's federal and political system. *Younger* is not an excuse, however, for manipulation by a state of both state and federal judicial proceedings to delay a decision on the merits of an important federal constitutional claim. Some three years after legal proceedings first ensued with regard to this issue, no state or federal trial court has had the issues presented to it on the merits. The only actual trial proceedings, thanks to Respondents' strategy, have been before a state administrative agency which has declared itself incompetent to render a ruling on this very same constitutional issue. Abstention is not appropriate in this instance, and this court should take this opportunity, Graff submits, to inform the states that *Younger* is not to be utilized in this fashion.

2. *Younger* Should not be Extended to Situations like the Instant One, Where No Vital State Interest has been Established.

Younger and its progeny have all examined whether a vital state interest was involved, on behalf of the State. The U.S. District Court, in this proceeding, determined that a vital state interest was involved, which was:

> The protection of its citizens' general health, welfare, and safety by forcing trucking companies, through state statute to be financially accountable for accidents . . . (Appendix B, *infra*, at p. 7a).

No evidence was submitted by Respondents to support this proposition. This finding was based on assertions by Respondents, in their pleadings, signed by Respondents' counsel. Those assertions of Respondents were controverted by Graff. No evidentiary hearings or oral arguments were had before the U.S. District Court. The conclusion of the U.S. District Court that a vital state interest was involved was erroneous.

The statutory provision in question, MCL 479.10a(6), is a small part of the Michigan Motor Carrier Act of 1933, MCL 475.1 *et seq.*, which governs the affairs of Michigan motor carriers. That provision simply states, in relevant part, at MCL 479.10a(6), that:

> The lease, contract, or arrangement shall provide that the vehicle, at all times, while being operated under the lease, contract, or arrangement, shall be operated only by persons who are employees of the holder who stand in relation to the holder as employee to employer.

That section and requirement was not added to the Michigan Motor Carrier Act until the latter half of the 1950's. It was part and parcel of a labor-backed initiative to assist unions in

organizing trucking companies[11]. The "employee" requirement for owner-operators in Michigan has nothing whatsoever to do with the right of a state to control entry or rates in intrastate transportation, however. Graff possesses intrastate authority as required by the Michigan Public Service Commission and has for decades. Graff's formation in 1921 even predates the present Michigan regulatory scheme.

What the state statutory provision does, however, is require a motor carrier to conform all of its operations, including its interstate operations, to an intrastate method of operations which has as its purpose the protection of a labor union. That is not, in Graff's view, a vital state function. The Interstate Commerce Commission has, for years, allowed motor carriers to treat their owner-operators as independent contractors. As was stated by the ICC in *Ex Parte No. MC-122 (Sub. No. 2), Lease of Equipment and Drivers to Private Carriers*, 132 MCC 756, 787 (1952),

> For general legal purposes, we held long ago that a regulated carrier can carry on its service with equipment leased from owner-operators as independent contractors, and it is our understanding that owner-operators are not typically treated as employees for tax purposes when they lease to regulated carriers.

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[11] The bill adding this language was even known as the "Wendell" amendment, after the late Otto Wendell, former governmental Affairs Director for the Teamsters' Union in Michigan. The bill has a union purpose, as *bona fide* independent contractors are not covered by the provisions of the National Labor Relations Act. See 29 U.S.C. § 152(3). In the case of trucking operations, the National Labor Relations Board, in determining whether or not individuals were truly independent contractors, has focused on the "right to control" test, with particular emphasis on the assumption of entrepreneurial risk by the owner-operator. See, in this regard, such cases as *Capital Parcel Delivery Co.*, 269 NLRB 52 (1984); *Don Bass Trucking*, 275 NLRB 1175 (1985); *Precision Bulk Transit, Inc.*, 279 NLRB No. 60, 122 LRRM 1098 (1986), and *Container Transit, Inc.*, 281 NLRB No. 141, 124 LRRM 1349 (1986).

In that same decision, the ICC noted that it had rejected a requirement that owner-operators be employees, as early as its decision in *Dixie Ohio Express Co. Common Carrier Application*, 17 MCC 735 (1939). *Lease of Equipment, supra*, at 780[12]. In addition to specifically holding that motor carriers can treat their owner-operators as independent contractors, the ICC has also promulgated an extensive set of rules, at 49 C.F.R. § 1057.11-12, which establishes in detail the contractual relationship which must exist between a motor carrier and its owner-operators. The employee relationship is not a part of that. Thus, the Michigan statutory requirement is totally contrary to the scheme crafted at the federal level[13]. It imposes substantial additional operational costs on carriers, also.

The fact of the matter is that motor carriers must maintain insurance for their operations and be responsible to the public for those operations, whether or not the motor carriers treat their drivers as independent contractors or employees, pur-

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[12] See also *Ex Parte No. MC-43, Lease and Interchange of Vehicles by Motor Carriers*, 522 MCC 675 (1951), again supporting the ability of interstate motor carriers to treat their owner-operators as independent contractors. In terms of tax treatment of the owner-operators, see, also, *United States* v. *Silk (Harrison* v. *Greyvan Lines, Inc.*, 331 U.S. 704; 64 S.Ct. 1463; 91 L.Ed. 1757 (1947), and *United States* v. *Mutual Trucking Co.*, 141 F.2d 655 (6th Cir., 1944), as well as Revenue Ruling 76-226 (1976), which provide guidance as to the parameters under which it is permissible, under the Federal Tax Laws, for motor carriers to treat their owner-operators as independent contractors.

[13] Graff initially posited in these various proceedings that there was no other state which had a requirement similar to Michigan's, based on testimony from its Chairman of the Board concerning Graff's experience as a motor carrier operator over a wide portion of the United States. Respondents have since pointed out that there are two other states, Washington and Rhode Island, which have in effect requirements such as Michigan's, for their intrastate transportation. Clearly, then, the impostion of such a requirement has not been found necessary by the vast majority of states or the federal government, in order to regulate economically intrastate or interstate motor transportation.

suant to federal regulations at 49 C.F.R. § 1043.1. Similarly, the MPSC has promulgated rules setting forth specific requirements for carriers to maintain public liability and property damage insurance for the protection of the public, at R 460.19101. These rules apply to regulated carriers operating in intrastate commerce in Michigan. Graff is one of those carriers. Accordingly, the insurance requirements of this state are already in force as to Graff, separate and apart from any requirement as to the status of the drivers. Further, the safety rules of the United States Department of Transportation, 49 C.F.R. § 390.1 *et seq.*, apply to all commercial motor vehicles, whether or not operated for-hire. Similarly, the rules of the Motor Carrier Division of the Michigan State Police, governing motor carrier safety, R 470.16101, apply to carriers whether or not those carriers are "for-hire". The conclusion of the U.S. District Court, then, was simply wrong. It relied on the incantation of a purpose by the State, for which there is no evidentiary support.

This court has, in the past, recognized the pitfalls in relying upon mere assertions of safety purposes for state requirements which interfere with interstate commerce, by a state, in cases such as *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520; 79 S.Ct. 962; 3 L.Ed.2d 1003 (1959), and *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429; 98 S.Ct. 787; 54 L.Ed.2d 664 (1978)[14]. That is why it is necessary for a court to determine whether there is actual evidence which supports a state's contention. No such evidence was presented in this case. The assertion by Respondents' counsel has no basis in law or in fact.

Neither does the interest of a state in maintaining a criminal prosecution have any further relevance, in this particular situation, where the criminal action has been resolved

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[14] See also, along these same lines, *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761; 65 S.Ct. 1515; 89 L.Ed.2d 1915 (1945) and *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662; 101 S.Ct. 1309; 67 L.Ed.2d 580 (1981).

in Graff's favor, because of the unconstitutionality of the state statute. There is no vital state interest worthy of protection in the instant case.

What the Michigan statute does, however, is not only assist labor unions, with regard to their organizing efforts of Michigan carriers operating in intrastate commerce, but, further, requires those carriers to either maintain two separate operations, using trucks in interstate commerce for one operation and intrastate commerce for another, or conform all of the carrier's operations to the Michigan dictated method — treating owner-operators as employees. This protects Michigan-based union carriers from competition from other carriers who elect not to operate in intrastate commerce, in that state, because of this requirement. Also, it increases the costs of operations and makes operations inefficient, for carriers operating in both interstate and intrastate commerce, by requiring those carriers to either treat their owner-operators as employees, or, in the alternative, to have two parallel operations, with inefficient equipment usage and worsened service commensurately. That is why this law is defective from both a Commerce Clause and Supremacy Clause standpoint. Yet, no federal court, or state court for that matter, has ruled on the legitimacy of the Michigan statutory provision, in light of the federal constitutional dictates, because of Respondents' legal chicanery. The asserted state interest here is not significant enough to invoke *Younger* abstention, under this court's past precedent. The decision should fall on this ground also.

CONCLUSION

Younger abstention is the exception, not the rule. If citizens are not to be deprived of the protection of the United States Constitution, then, it is necessary for the courts to give *Younger*'s "bad faith" exception meaning, by refusing to allow states to employ abstention as a manipulative device to

delay or prevent altogether a ruling on the merits on the question of the propriety of a state statute under the U.S. Constitution. Michigan's actions, as outlined here, reflect a contempt for the judicial process. It should not be countenanced by this court. This is an important question of federal law, which, in Petitioner's view, has not yet been settled. A state should not be allowed to avoid federal court jurisdiction in ruling on a claim such as is involved here, when the state courts have already ruled, in a criminal proceeding, that the statute in question is unconstitutional. Neither should states be allowed to recite a purpose, such as safety, for which there is no evidence of record, in support of a *Younger* abstention claim. *Younger* should not be allowed to become a shield against legitimate judicial inquiry as to the constitutionality of a state statute under the U.S. Constitution. *Younger* has never been held to mean that. It should not be held to mean that now.

For the reasons expressed, it is respectfully prayed that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

By: /s/ Robert E. McFarland
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Graff Trucking Company, Inc.

Date: February 18, 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-2320

NOT RECOMMENDED FOR PUBLICATION

GRAFF TRUCKING COMPANY, INC.,
Plaintiff-Appellant,

v.

FRANK J. KELLEY; et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN
(Decided and Filed August 31, 1990)

Before: JONES and NORRIS, Circuit Judges; TODD, District Judge.*

PER CURIAM. Plaintiff, Graff Trucking Company, Inc., appeals from the judgment of the district court dismissing, upon grounds of abstention, plaintiff's action for injunctive and declaratory relief, and the court's order denying its motion for a new trial.

Having had the benefit of oral argument and having

* The Honorable James D. Todd, United States District Judge for the Western District of Tennessee, sitting by designation.

carefully considered the record on appeal and the briefs of the parties, we are unable to say that the district court erred in dismissing the action without prejudice and in denying the motion for a new trial.

Although there was considerable discussion during oral argument concerning changes in circumstances that may have occurred since this cause was appealed, we are, of course, limited to the record before us on appeal. We note that the action was dismissed without prejudice, and that the district court would be in the position to entertain another filing by plaintiff should defendants engage in conduct which denies plaintiff rights guaranteed it under the United States Constitution. We have every confidence that the defendants will see their duty in that regard, and will not subject plaintiff to unwarranted litigation and expense.

As the reasons why judgment should be entered for defendants have been articulated by the district court, the issuance of a written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the judgment of the district court dismissing the action without prejudice and the order denying the motion for new trial, are **affirmed** upon the reasoning set out by the district court in its opinion of August 18, 1989.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. L89-30043-CA
Hon. Benjamin F. Gibson

GRAFF TRUCKING COMPANY, INC.,
Plaintiff,

v.

FRANK J. KELLEY, WILLIAM E. LONG, STEVEN M. FETTER, RONALD E. RUSSELL, and CAPTAIN ANTHONY PHILLIPS,
Defendants.

JUDGMENT

(Filed August 18, 1989.)

At a session of the Court held in and for said District and Division, in the City of Grand Rapids, Michigan, this 18th day of August, 1989.

PRESENT: HON. BENJAMIN F. GIBSON, DISTRICT JUDGE

In accordance with the Opinion dated August 18, 1989, this Court abstains from deciding the merits of this case, and IT IS HEREBY ORDERED that plaintiff's complaint is DISMISSED without prejudice to plaintiff's right to return to this Court if it is not afforded a fair and prompt hearing from the state proceedings.

IT IS SO ORDERED.

/s/ BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

DATED: August 18, 1989.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. L89-30043-CA
Hon. Benjamin F. Gibson

GRAFF TRUCKING COMPANY, INC.,
Plaintiff,

v.

FRANK J. KELLEY, WILLIAM E. LONG, STEVEN M. FETTER, RONALD E. RUSSELL, and CAPTAIN ANTHONY PHILLIPS,
Defendants.

OPINION
(Filed August 18, 1989.)

INTRODUCTION

Plaintiff Graff Trucking Company, Inc. filed this action seeking both a preliminary injunction and declaratory relief against defendants Frank J. Kelley, Attorney General of Michigan, William E. Long, Chairperson of the Michigan Public Service Commission ("MPSC"), Steven M. Fetter and Ronald E. Russell, Commissioners of the MPSC, and Captain Anthony Phillips, Commander of the Motor Carrier Division of the Michigan State Police. Plaintiff claims that Michigan Compiled Laws Annotated Section 479.10a(6) ("Section 479.10a(6)") violates its fourteenth amendment rights and is a violation of the Commerce Clause, article I, section 8, of the United States Constitution. Presently pending before the Court is defendants' motion to dismiss the complaint on the grounds of abstention.

ANALYSIS

In *Younger* v. *Harris*, 401 U.S. 37 (1971), plaintiff brought a civil rights action under Title 28 United States Code Section 1983 in federal district court to enjoin a criminal proceeding pending against him. The Supreme Court held that an ongoing state criminal proceeding may not ordinarily be enjoined by a federal court. *Id.* at 49. *Younger* and its progeny "espouse a strong federal policy against federal court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex County Ethics Committee* v. *Garden State Bar Association*, 457 U.S. 423, 431 (1982). Underlying *Younger* are the principles of federalism and

> "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and . . . the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways . . . What the concept does represent is a system in which there is sensitivity to legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger, 401 U.S. at 44.

In *Parker* v. *Commonwealth of Kentucky, Board of Dentistry*, 818 F.2d 504 (6th Cir. 1987), the Sixth Circuit set forth a three-prong test for determining whether *Younger* abstention should apply in particular case. "First, the court must determine whether state proceedings, including administrative proceedings, are pending. Second, the state proceedings must involve an important state interest. Third, the court must determine whether the state proceedings will af-

ford the plaintiff an adequate opportunity to raise his constitutional claims." *Id.* at 508 (citations omitted).

A. PENDING STATE PROCEEDINGS

The Court is aware of two pending state proceedings, thus the first prong of the *Parker* test is satisfied. Two days after plaintiff filed this action in federal court, the Motor Carrier Division of the Michigan State Police served the plaintiff with fourteen citations for the violation of Section 479.10a(6) which are now pending in the District Court for the Third Judicial District, Centerville, Michigan. In addition, on May 22, 1989, plaintiff was served with a formal complaint now pending before the MPSC.

Although the factual situations of *Younger* and the case at hand are distinguishable, these distinctions do not affect the applicability of *Younger*. The fact that the state proceedings were commenced subsequent to the filing of this action does not automatically preclude *Younger* doctrine abstention. *See Hicks* v. *Miranda*, 422 U.S. 332, 349 (1975). In fact, the Supreme Court in *Hicks* held that if the state court proceeding was commenced "after the federal complaint is filed but before any proceedings of substance on the merits have taken place in federal court the principles of *Younger* v. *Harris* should apply in full force." *Id. Hicks* decreased the importance of the race to the courthouse results which previously were dispositive; to do otherwise would "trivialize the principles of *Younger* v. *Harris*." *Id.* at 350.

B. IMPORTANT STATE INTEREST

The legislature in enacting Section 479.10a(6) was attempting to impose liability on parties more likely to be economically capable of covering damages resulting from accidents involving a motor carrier. Section 479.10a(6) provides in pertinent part that where a motor carrier attempts to complement his existing equipment through the leasing of a vehicle, "the lease, contract, or arrangement shall provide that the vehicle, at all times, while being operated under the lease, contract,

or arrangement, shall be operated only by persons who are employees of the holder who stand in a relation to the holder as employee to employer." M.C.L.A. § 479.10a(6). The protection of its citizens' general health, welfare and safety by forcing trucking companies, through state statute, to be financially accountable for accidents is an important state function. Thus, the second prong requiring that the state proceedings involve an important state interest also is satisfied.

C. ADEQUACY OF STATE PROCEEDINGS

The final prong of the *Parker* test requires the federal court to determine whether the state proceedings will afford the plaintiff an adequate opportunity to raise his constitutional claims. In this case, the Court finds that plaintiff will be able to raise his constitutional claims in the state proceedings and may appeal any MPSC order to the state court of appeals pursuant to Michigan Compiled Laws Annotated Sections 479.20, 462.26.

Having found all three *Parker* prongs satisfied, the Court is compelled to refrain from interfering with the pending state proceedings under the notions of comity and federalism absent proof of extraordinary circumstances which would bring one of the *Younger* exceptions into play. A federal court may intervene where it otherwise would abstain if the state proceeding is motivated by a desire to harass, if the state proceeding is conducted in bad faith, or where the state statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Younger*, 401 U.S. 53-54.

Plaintiff alleges that there has been a showing of bad faith in this case since this is the first time a formal complaint proceeding has been brought for a violation Section 479.10a(6). However, the Court does not believe that the first prosecution under a statute is sufficient evidence that the action was brought in bad faith. Instead, the Court finds that the state is simply trying to enforce the law to protect its citizens from what it sees as a potential liability loophole.

CONCLUSION

For the reasons stated above, the Court abstains from hearing the plaintiff's claim and permits the state court to address the constitutional challenges against Section 479.10a(6). Accordingly, defendants' motion for abstention is granted and plaintiff's complaint is dismissed without prejudice to plaintiff's right to return to this Court if it is not afforded a fair and prompt hearing.

/s/ BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. L89-30043-CA
Hon. Benjamin F. Gibson

GRAFF TRUCKING COMPANY, INC.,
Plaintiff,

v.

FRANK J. KELLEY, WILLIAM E. LONG, STEVEN M. FETTER, RONALD E. RUSSELL, and CAPTAIN ANTHONY PHILLIPS,
Defendants.

OPINION

(Filed October 16, 1989)

Plaintiff Graff Trucking Company, Inc. ("Graff") filed its Motion for a New Trial (or Rehearing) of this Court's Opinion and Judgment dated August 18, 1989, pursuant to Rule 59 of the Federal Rules of Civil Procedure. This opinion dismissed plaintiff's complaint on the grounds that the *Younger* abstention doctrine was applicable. *See Trainor* v. *Hernandez*, 431 U.S. 434 (1977); *Younger* v. *Harris*, 401 U.S. 37 (1971). Plaintiff Graff argues that the Supreme Court's recent decision in *New Orleans Pub. Serv., Inc.* v. *New Orleans*, 109 S. Ct. 2506 (1989) ("NOPSI") renders the *Younger* doctrine inapplicable to this case.

This Court has reviewed the parties' memorandums regarding this motion and the *NOPSI* opinion. This Court is of the opinion that the *NOPSI* decision does not affect the result

reached by this Court in its August 18, 1989, Opinion and Judgment. Therefore, the plaintiff's motion is denied.

/s/ BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

DATED: October 12, 1989

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. L89-30043-CA
Hon. Benjamin F. Gibson

GRAFF TRUCKING COMPANY, INC.,
Plaintiff,

v.

FRANK J. KELLEY, WILLIAM E. LONG, STEVEN M. FETTER, RONALD E. RUSSELL, and CAPTAIN ANTHONY PHILLIPS,
Defendants.

ORDER
(Filed October 16, 1989)

At a session of the Court held in and for said District and Division, in the City of Grand Rapids, Michigan, this 12th day of October, 1989.

PRESENT: HON. BENJAMIN F. GIBSON, U.S. DISTRICT JUDGE

In accordance with the Opinion dated October 12, 1989, IT IS HEREBY ORDERED that plaintiff Graff Trucking Company, Inc.'s motion for a new trial (or rehearing) is DENIED.

IT IS SO ORDERED.

/s/ BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-2320

GRAFF TRUCKING COMPANY, INC.,
Plaintiff-Appellant,

v.

FRANK J. KELLEY, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ET AL.,
Defendants-Appellees.

ORDER
(Filed November 6, 1990)

BEFORE: JONES and NORRIS, Circuit Judges; and TODD*, United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ LEONARD GREEN
Clerk

* Hon. James D. Todd sitting by designation from the Western District of Tennessee.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 89-2320

GRAFF TRUCKING COMPANY, INC.,
Plaintiff-Appellant,

v.

FRANK J. KELLEY, Attorney General of the State of Michigan; WILLIAM E. LONG, Chairperson of the Michigan Public Service Commission; STEVEN M. FETTER, Commissioner of the Michigan Public Service Commission; RONALD E. RUSSELL, Commissioner of the Michigan Public Service Commission; ANTHONY PHILLIPS, Captain, Commander of the Motor Carrier Division of the Michigan State Police,
Defendants-Appellees.

ORDER
(Filed November 8, 1990)

The order filed on November 6, 1990 denying the petition for rehearing and rehearing en banc having been issued inadvertently,

It is ORDERED vacated. The petition for rehearing en banc, response and reply remain pending before the court.

ENTERED PURSUANT TO RULE 8
(b) RULES OF THE SIXTH CIRCUIT
Leonard Green, Clerk

/s/ LEONARD GREEN

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 89-2320

GRAFF TRUCKING COMPANY, INC.,
Plaintiff-Appellant,

v.

FRANK J. KELLEY, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ET AL.,
Defendants-Appellees.

ORDER
(Filed November 19, 1990)

BEFORE: JONES and NORRIS, Circuit Judges; and TODD*, United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Clerk

* Hon. James D. Todd sitting by designation from the Western District of Tennessee.

APPENDIX G

IN THE DISTRICT COURT OF THE
STATE OF MICHIGAN
IN AND FOR ST. JOSEPH COUNTY

File No. 89-1137

THE PEOPLE OF THE STATE OF MICHIGAN
v.
GRAFF TRUCKING, INDIANA DIVISION,
Defendant.

COMMERCIAL VEHICLE, CONDUCTING INTRASTATE FREIGHT MOVES UNDER IMPROPER LEASE

MOTION TO DISMISS

BEFORE THE HONORABLE WILLIAM L. McMANUS

Centreville, Michigan

Wednesday, June 20, 1990 — at about 11:07 a.m.

APPEARANCES:

MR. LEE F. FISHER
Assistant Prosecuting Attorney
Appeared on behalf of the People;

MR. ROBERT E. McFARLAND
Attorney at Law
Appeared on behalf of the Defendant.

Kenneth R. Nelson (CSR-0508)
Official Court Reporter

* * *

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WITNESSES
None

EXHIBITS
None

Centreville, Michigan
June 20, 1990 — at about 11:07 a.m.
(Court and counsel present)

THE COURT: People against Graff Trucking. This is File 89-1137.

It involves a number of citations written to Graff Trucking Company charging violations of Act 254 of the Public Acts of 1933, Michigan Compiled Laws 479.10a, commercial vehicle, conducting intrastate freight moves under improper lease.

The matter this morning is on a motion by the defense to dismiss.

You're Robert McFarland?

MR. McFARLAND: Yes.

THE COURT: You may proceed.

MR. McFARLAND: Your Honor, the subject matter, as the Court has indicated, has to do with an alleged violation by Graff Trucking, an Indiana Division.

One provision of the Motor Carrier Act is a provision which requires trucking companies to use in its leased equipment individuals who stand in relationship to the carrier as employee to employer.

This act is a part of Act 254 of 1933 as amended.

However, this provision was added in 1959, twenty-six years after the Act was initially passed and

* * *

THE COURT: I'm inclined to think, considering the Constitution of the United States and of Michigan and the relationship of Graff Trucking to the drivers, that the opinion of Judge Nelson seems to me to make some sense, and the

argument that this is a burden upon interstate commerce imposed by the State of Michigan and by no one else makes some sense.

Based upon those findings, I'll dismiss these citations based upon merely the fact that Graff Trucking Company doesn't withhold income taxes or FICA from their compensation paid to the drivers.

That does not necessarily mean that they're not employees for all other purposes, and that to require Graff to act or any trucking company to act differently in Michigan and, therefore, impose restraints upon their business in other states in interstate commerce acts to create undue burden in violation of the U.S. Constitution. I won't touch upon the Michigan Constitutional provision regarding object of the original statute and whether or not this economic impact violates that provision.

The matters will be shown as dismissed.

Counsel may prepare an order accordingly, if you wish, and present it to the prosecution for their approval, and I'll sign it.

I'll also return these extra copies. Maybe you can use them for someone else.

MR. FISHER: Thank you, your Honor.

MR. McFARLAND: Thank you, your Honor.

APPENDIX H

STATE OF MICHIGAN
IN THE 3RD DISTRICT COURT, DIVISION TWO

Case No. 89-1137-1-ST

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

v.

GRAFF TRUCKING, INDIANA DIVISION,
Defendant.

ORDER

At a session of said Court, held in the District Court, City of Centreville, County of St. Joseph, Michigan on June 27, 1990.

PRESENT: HON. William L. McManus
District Court Judge

This matter having come on to be heard on Defendant's Motion to Dismiss, and the Court having reviewed the pleadings and arguments of the parties and being fully apprised of the same.

IT IS HEREBY ORDERED AND ADJUDGED that Citation Nos. T-321161—T-32174 charging Defendant with violations of MCL 479.10a are dismissed, for the reasons expressed by the Court in its bench opinion of June 20, 1990, including the grounds that:

1. An employer-employee relationship may be maintained, for purposes of this statute, without the need for the employer to withhold federal and state taxes, etc. (See *People of the State of*

Michigan v. *ABC Cartage Co.*, Case No. 89-002118, Opinion of May 15, 1990); and

2. This statute constitutes an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, U.S. Const., Art. I, Section 8.

/s/ WILLIAM L. McMANUS
The Honorable William L. McManus
District Court Judge

APPROVED AS TO FORM:

/s/ LEE F. FISHER
(P-42384)
Assistant Prosecuting Attorney
St. Joseph County
New Courts Building
P.O. Box 250
Centreville, MI 49032-0250
(616) 467-6361

/s/ ROBERT E. McFARLAND
(P17394)
Attorney for Defendant
Graff Trucking, Indiana Div.
2100 North Woodward Avenue
Suite 130
Bloomfield Hills, Michigan 48013
(313) 258-4880

APPENDIX I

CHART OF CASES

A1. *People of the State of Michigan* v. *CTX Division of Central Transport, Inc.*, District Court No. C-88-0736—C-88-0762, 34th Judicial District.

Twenty-five misdemeanor citations issued in January, 1988. Defendant filed a Motion to Dismiss, based on the unconstitutionality of MCL 479.10a(6). The Court issued an order holding the case in abeyance, while Defendant filed state court action for a declaratory judgment in circuit court (A2). When A2 was dismissed, the district court dismissed the twenty-five charges on April 26, 1989. Dismissal was not appealed by State.

A2. *Central Transport, Inc. and its CTX Division* v. *State of Michigan and the Michigan Public Service Commission*, Circuit Court No. 88-816850-CZ, Wayne County Circuit Court.

Based on stay order and stipulation in A1, this action for a declaratory judgment, declaring MCL 479.10a(6) unconstitutional was filed in July, 1988. State moved to dismiss, claiming it was already before a court of competent jurisdiction (A1). State's motion granted, on March 26, 1989.

A3. *Central Transport, Inc.*, File No. C-6714, Case No. 60.

Michigan Public Service Commission Staff intervened in Michigan Public Service Commission application filed in December, 1988, claiming applicant unfit for violations of MCL 479.10a(6). Applicant claimed the statute unconstitutional. The Commission ruled it did not possess power to declare its own statute unconstitutional on January 9, 1990.

B1. *Graff Trucking Company, Inc.* v. *Frank J. Kelley, Attorney General of the State of Michigan, William E. Long, Chairperson of the Michigan Public Service Commission; Steven M. Fetter, Commissioner of the Michi-*

gan Public Service Commission; Ronald E. Russell, Commissioner of the Michigan Public Service Commission; and Captain Anthony Philipps, Commander of the Motor Carrier Division of the Michigan State Police, U.S. District Court File No. L89-30043-CA, filed May 2, 1989.

This matter is the subject of this appeal.

B2. *People of the State of Michigan* v. *Graff Trucking, Indiana Division*, District Court No. 89-1137 (3-2 Judicial District).

Fourteen misdemeanor citations were issued against Graff on May 4, 1989, for violation of MCL 479.10a(6). Graff filed a Motion to Dimiss, claiming the statute unconstitutional. On June 20, 1990, the court, in a bench opinion followed by an order on June 27, 1990, dismissed the case, ruling that the statute violated the U.S. Constitution. Dismissal not appealed by the State.

B3. *In the Matter of the Complaint Against Graff Trucking Company, Inc., Filed by the Michigan Public Service Commission Staff*, File No. T-1075.

A formal complaint was filed against Graff on May 22, 1989, claiming violations of MCL 479.10a(6), and requesting various relief, including assessment of fines and revocation of Graff's intrastate operating authority. This matter is presently pending before the administrative law judge.

C1. *People of the State of Michigan* v. *ABC Cartage Company*, District Court No. 89-002118 (52-3 Judicial District).

Misdemeanor citations issued against ABC claiming violation of MCL 479.10a(6). ABC claimed the MPSC interpretation went beyond statutory requirements. District court agreed and dismissed on May 15, 1990. Dismissal not appealed by the State.

D1. *Universal Am-Can, Ltd.* v. *Frank J. Kelley, Attorney*

General of the State of Michigan, William E. Long, Chairperson of the Michigan Public Service Commission; Steven M. Fetter, Commissioner of the Michigan Public Service Commission; Ronald E. Russell, Commissioner of the Michigan Public Service Commission; and Captain Anthony Philipps, Commander of the Motor Carrier Division of the Michigan State Police, Circuit Court No. 89-3884-AW, (Macomb County Circuit Court).

On September 22, 1989, Universal filed a complaint seeking a declaratory ruling that MCL 479.10a(6) was unconstitutional. The State moved to dismiss, claiming Universal should file a petition for declaratory ruling with Michigan Public Service Commission. Motion for dismissal granted on January 19, 1990 (see however, A3). The matter is presently pending before Michigan Court of Appeals. Issue is propriety of dismissal on exhaustion grounds.

D2. *People of the State of Michigan* v. *Universal Am-Can, Ltd.*, District Court Nos. 90-003143-4-ST (52-3 Judicial District).

Two misdemeanor citations issued against Universal for violations of Michigan Motor Carrier Act on October 16, 1990, with issue of the same statutory provision involved. Motion to Dismiss filed by Universal, based on the unconstitutionality of the statute. Motion pending.

APPENDIX J

STATE OF MICHIGAN
IN THE 34TH DISTRICT COURT COUNTY OF WAYNE

District Court No. C88-0736, C-88-0737, C88-0738, C88-0739, C88-0742, C88-0743, C88-0744, C88-0745, C88-0746, C88-0747, C88-0748, C88-0749, C88-0750, C88-0751, C88-0752, C88-0753, C88-0754, C88-0755, C88-0756, C88-0757, C88-0758, C88-0759, C88-0760, C88-0761, C88-0762

PEOPLE OF THE STATE OF MICHIGAN
v.
CTX, DIVISION OF CENTRAL TRANSPORT, INC.,
Defendant.

HEARING

BEFORE THE HONORABLE KALEM GARIAN,
DISTRICT JUDGE

Romulus, Michigan — Wednesday, April 26, 1989

APPEARANCES:

For The People: MS. DENISE D. GREEN P35194
3000 Henry Ruff Road
Westland, Michigan 48185
(313) 278-8310

RECORDED BY: Susanne L. Hughes, CER 3415
Certified Electronic Recorder
(313) 941-4462

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WITNESSES: PEOPLE
None.

EXHIBITS:
None.

[3] Romulus, Michigan
Wednesday, April 26, 1989 — at 11:38 a.m.

THE COURT: What are you going to do with those 25 cases?

MS. GREEN: What 25 cases?

THE COURT: The ones that were handed to you.

MS. GREEN: Oh, I haven't even looked at them yet, your Honor.

THE COURT: All right. Well, you don't have to. They should be dismissed. There's a Circuit Court Order ruling that those — it's illegal for the — to have charged — what was it, the driver or something on that one? They found out that some Circuit Judge has already made a ruling on it. That's why they just brought it back here.

MS. GREEN: I'll look —

THE COURT: You can look at it.

(At 11:38 a.m., court recessed)

(at 11:42 a.m., court reconvened)

THE COURT: This was a case of 25 cases against CTX, Division of Central Transportation, Incorporated. Let the record reflect this case is now brought — brought back before this Court after the Circuit Court had made a ruling in which would be binding on this Court, and that is that there can be a leasing agreement without the employer-employee relationship.

MS. GREEN: Um hum (affirmative response).

[4] THE COURT: This required a leasing arrangement only between employer-employee in the Circuit Court ruling. This Court's going to dismiss all 25 cases.

MS. GREEN: Thank you, your Honor.
(At 11:46 a.m. proceedings concluded)

CERTIFICATE

STATE OF MICHIGAN)
)
COUNTY OF WAYNE)

I certify that this transcript, consisting of 5 pages, is a complete, true, and correct transcript, to the best of my ability, of the proceedings and testimony taken in this case on April 26, 1989.

April 16, 1990

/s/ SUSANNE L. HUGHES CER 3415
11131 S. Wayne Road
Romulus, Michigan 48174

APPENDIX K

STATE OF MICHIGAN
IN THE 52-3 JUDICIAL DISTRICT

Case No. 89-002118

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

v.

ABC CARTAGE COMPANY,
Defendant.

OPINION

The Defendant was charged with improper leasing under Act 254. This case came to trial on March 7, 1990. Stipulated facts were placed on the record and both parties given thirty days to present briefs.

The issue is whether drivers who don't have their state and federal taxes withheld from their wages by the Defendant are employees or contractors? The Court finds that is not sufficient to prove guilt beyond a reasonable doubt. Therefore, the Defendant is found not guilty.

In this case the Defendant hired several persons who supervised the delivery of the Defendant's merchandise out of the Defendant's warehouse. The prosecutor relies on an opinion of the Public Service Commission, which requires not only the control over these people that an employer usually exercises but that the state and federal taxes be withheld from these drivers or they are not employees.

The Court concedes to the prosecutor that an employer is required to withhold certain state and federal taxes from employees. The failure to do so would be some proof that they are not considered employees by the employer or driver.

However, it is just as easy and even easier for the taxing agencies to find that, if the requisite control that denotes an employer agreed to by the parties in their stipulations were present, they would find the Defendant was liable for withholding. Therefore, the Court finds that the Commission opinion is not binding.

Further, the Court concludes that the failure to withhold state and federal taxes is of less value than the exclusive control of the drivers. Since the intent of the legislation is to regulate the activity, the actual control of the driver's activity is of utmost importance, not the failure to comply with tax laws; which have no bearing on the driver's activities.

Dated: May 15, 1990

/s/ RALPH H. NELSON
District Judge

APPENDIX L

STATE OF MICHIGAN
IN THE DISTRICT COURT FOR THE
34th JUDICIAL DISTRICT

Case Nos. T-220501—T-220525

PEOPLE OF THE STATE OF MICHIGAN
v.
CTX, DIVISION OF CENTRAL TRANSPORT, INC.,
Defendant.

Andrew S. Telek (P-21320)
Assistant Wayne County Prosecutor
Attorney for the People
3000 Henry Ruff Road
Westland, Michigan 48185

Robert E. McFarland (P-17394)
McFarland & Bullard
Attorney for Defendant
CTX Division of Central Transport, Inc.
2100 North Woodward Avenue
Suite 130
Bloomfield Hills, Michigan 48013

MOTION AND STIPULATION OF PARTIES TO HOLD MATTERS IN ABEYANCE

NOW COME People of the State of Michigan, by Andrew S. Telek, Assistant Wayne County Prosecutor, and CTX Division of Central Transport, Inc., by its attorney Robert E. McFarland, and hereby move and stipulate as follows:

1. On or about January 21, 1988, 25 citations were issued against Defendant in the above-referenced proceedings, alleging improper leasing agreements, lacking an employee-employer relationship existing between Defendant and certain of its drivers, in violation of MCLA 479.10(a)(6) of the Michigan Motor Carrier Act, Public Act 254 of 1933, as amended.

2. Defendant entered its plea of not guilty to the charges and, on or about March 31, 1988, filed with the court a Motion to Dismiss, Affidavit in Support Thereof, and Brief in Support of Motion to Dismiss.

3. In open court on April 27, 1988, a discussion ensued between the parties, at which time it was agreed that Defendant would, in the interest of judicial economy, and in order to expedite these proceedings, file a Complaint for Declaratory Judgment with the Circuit Court for the County of Wayne, in order to obtain a decision on the merits of the matters raised in its Motion to Dismiss, which is grounded in both federal and state constitutional claims. It was noted by Defendant's counsel that the issues involved herein are of statewide significance and importance to the regulated motor carrier industry in Michigan generally. It was agreed by the parties, with the concurrence of the court, that the 25 citations would be held in abeyance, while the Petition for Declaratory Judgment is pending.

WHEREFORE, the parties stipulate and move that these 25 citations be held in abeyance by the District Court for the 34th Judicial District, while the Complaint for Declaratory Judgment is pending and that Defendant CTX Division of Central Transport, Inc. will file by July 10, 1988, a Complaint for Declaratory Judgment with the Circuit Court for

the County of Wayne, concerning the federal and state constitutional issues which underlie its Motion to Dismiss.

/s/ ANDREW S. TELEK
Andrew S. Telek
Assistant Wayne County Prosecutor
Attorney for the People of the State of Michigan
3000 Henry Ruff Road
Westland, MI 48185

Robert E. McFarland
McFarland & Bullard
Attorney for Defendant
CTX Division of Central Transport, Inc.
2100 North Woodward
Suite 130
Bloomfield Hills, MI 48013

Dated: June 23, 1988

ORDER

At a session of said court held in Romulus, Michigan on the 29th day of June, 1988

PRESENT: JAMES B. STONE
The Honorable James B. Stone
District Court Judge

This court having read the attached Stipulation and Motion of the parties, and being fully apprised of the issues herein; and it appearing that it would further the interest of justice and judicial economy for Defendant CTX Division of Central Transport, Inc., to seek a resolution of the constitutional issues involved in these proceedings by filing a Complaint for Declaratory Judgment with the Circuit Court for the County of Wayne, in order to obtain the most expeditious resolution of the issues involved,

IT IS HEREBY ORDERED AND ADJUDGED that Case Nos. T-220501—T-220525 be held in abeyance while Defendant CTX Division of Central Transport, Inc. pursues its Complaint for Declaratory Judgment.

/s/ JAMES B. STONE
The Honorable James B. Stone
District Court Judge

Dated: June 23, 1988

APPENDIX M

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

Hon. Wm. Leo Cahalan (P11509)
Case No. 88-816850-CZ

CENTRAL TRANSPORT, INC., and its CTX DIVISION,
Plaintiffs,

v.

STATE OF MICHIGAN and the MICHIGAN PUBLIC SERVICE COMMISSION,
Defendants.

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION.

OPINION

This case arises from a cause pending in the Thirty-Fourth (34th) District Court. Central Transport, Inc. was therein charged with some twenty-five citations for violations of Michigan Public Service Commission rules attending the operation of a trucking company. Plaintiff has filed the instant action to secure a judgment under MCR 2.605(A) declaring that MCLA 479a6 (forming the basis for the citations below) is unconstitutional. The State of Michigan and the Michigan Public Service Commission have filed this motion for summary disposition.

The identical issues before this Court now are pending in the Thirty-Fourth (34th) Judicial District. That Court is fully competent to adjudicate the questions. For this Court to ar-

rogate that function to itself would constitute an abuse of discretion.

> While plaintiff raises 14 questions in his petition, they relate to matters that may be presented in the criminal case that is pending. We condemn the practice of a person who, after being charged with violating the law, then asks for a declaratory judgment in an independent cause, with the result that two cases involving the same subject matter are pending at the same time. If such a practice were permitted, it would cast an unnecessary burden on the courts and the law enforcement authorities. The general rule is set forth in *Woolard* v. *Schaffer Stores Co.*, 272 NY 304, 311 (5 NE[2d] 829, 109 ALR 1262); 273 NY 527 (7 NE[2d] 676, 109 ALR 1267), where Justice O'Brien said:
>
> > "When, however, another action between the same parties, in which all issues could be determined, is actually pending at the time of the commencement of an action for a declaratory judgment, the court abuses its discretion when it entertains jurisdiction. *Colson* v. *Pelgram*, 259 NY 370 (182 NE 19)."
>
> A declaratory judgment is not a substitute for regular actions. *Washington-Detroit Theatre Co.* v. *Moore*, 249 Mich 673 (68 ALR 105); *Village of Grosse Pointe Shores* v. *Ayres*, 254 Mich 58; *Miller* v. *Siden*, 259 Mich 19. One test of the right to institute proceedings for declaratory judgment is the necessity of present adjudication as a guide for plaintiff's future conduct in order to preserve his legal rights. *City of Flint* v. *Consumers Power Co.*, 290 Mich 305. Plaintiff is first charged with violating the law; then he asked for a declaratory judgment in an independent proceeding while the criminal suit was still pending. Borchard in his work on Declaratory Judgments, p 179, states as follows:

> "Yet where a suit or proceeding is already pending involving the same issues, it is manifestly unwise and unnecessary to permit a new petition for a declaration to be initiated by the defendant or the plaintiff in that suit. * * * The first court seized of the issues involved, if identical, whether by action for declaratory or other judgment, must be permitted to retain jurisdiction of the case." *Updegraff* v. *Attorney General*, 298 Mich 48, 51, 52 (1941); see also *Com'r of Revenue* v. *GTWR Co.*, 326 Mich 371 (1949);

Consistent with the preceding, defendants' motion for summary disposition shall be GRANTED.

/s/ WILLIAM LEO CAHALAN
Judge, Third Judicial Circuit

March 22, 1989

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

Hon. William Leo Cahalan (P11509)
Case No. 88-816850-CZ

CENTRAL TRANSPORT, INC., and its CTX DIVISION,
Plaintiffs,

v.

STATE OF MICHIGAN and the MICHIGAN
PUBLIC SERVICE COMMISSION,
Defendants.

ORDER

At a session of said Court held in the City-County Building, Detroit, Michigan on March 22, 1989

PRESENT: HON. WILLIAM LEO CAHALAN
Circuit Judge

Being fully avised in the premises, after plenary review and consistent with the tenor of the foregoing Opinion,

IT IS HEREBY ORDERED AND ADJUDGED that defendants' motion for summary disposition is GRANTED.

This Court retains no further jurisdiction.

/s/ WILLIAM LEO CAHALAN
Circuit Judge

APPENDIX N

[LETTERHEAD OF McFARLAND & BULLARD]

April 18, 1989

The Honorable James B. Stone
District Court Judge
34th Judicial District
11131 South Wayne Road
Romulus, Michigan 48174

Re: Central Transport, Inc., and its CTX Division v. State of Michigan and the Michigan Public Service Commission, Case No. 88-816850-CZ; People of the State of Michigan v. CTX Division of Central Transport, Inc., Case Nos. T-220501—T-220525

Dear Judge Stone:

As you will recall, the Motor Carrier Division of the Michigan State Police issued 25 citations against the CTX division of Central Transport, Inc. in January of 1988, alleging improper leasing agreements, lacking an employer-employee relationship between Defendant and certain of its drivers in violation of MCL 479.10(a)(6) of the Michigan Motor Carrier Act, 1933 P.A. 254, as amended. On March 31, 1988, Defendant filed with the Court a Motion to Dismiss, Affidavit in Support Thereof and Brief in Support of Motion to Dismiss. On April 27, 1988, after a discussion between your Honor, Assistant Wayne County Prosecutor Andrew S. Telek, and me, it was agreed that Defendant would, in the interest of judicial economy, and in order to expedite the proceedings, file a Complaint for Declaratory Judgment with the Wayne County Circuit Court, raising the federal and state constitutional grounds which Defendant had earlier relied upon in its Motion to Dismiss before this Court. On

June 29, 1988, an order was entered, holding the citations in abeyance while Defendant CTX division of Central Transport, Inc. pursued its Complaint for Declaratory Judgment in the Wayne County Circuit Court.

In response to the complaint, the Attorney General filed a Motion for Summary Disposition or in the Alternative Motion for Change of Venue, to which Central Transport responded. The parties appeared in Wayne County Circuit Court on September 30, 1988 to argue the motion, at which time no oral arguments were heard, as Judge William Leo Cahalan indicated to the parties that he wished to adjourn the matter to further study the legal positions of the parties. He also allowed the parties to submit any additional authority to which they wished to address his attention.

Thereafter on March 22, 1989, Judge Cahalan granted Defendants' Motion for Summary Disposition. Attached is a copy of the Opinion and Order. Judge Cahalan noted as follows at p. 2 of his Opinion:

> The identical issues before this court now are pending in the Thirty-fourth (34th) Judicial District. That court is fully competent to adjudicate the questions. For this court to arrogate that function to itself would constitute an abuse of discretion.

It had been the position of my client that the cases relied upon in support of Judge Cahalan's decision were distinct on their facts and distinguishable, and that in those cases, the parties had not agreed to hold a district court matter in abeyance and the district court had not stayed its proceedings, in the interest of judicial economy, as is the situation here. However, again with a view to obtaining the quickest possible resolution of this matter we have not appealed Judge Cahalan's decision, as it turns on only a narrow legal point, not related to the merits of the constitutional claims raised by my client, and an appeal to the Court of Appeals would necessarily involve further delay, with only the possibility of a remand to the Wayne County Circuit Court held out.

Accordingly, we would respectfully request that our Motion to Dismiss be considered as soon as possible, in accordance with the decision of Judge Cahalan. Thank you for your consideration in this matter.

Very truly yours,
/s/ ROBERT E. McFARLAND

REM/mam
Enclosure
cc: Mr. Andrew S. Telek
Mr. James D. Payne

APPENDIX O

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC
SERVICE COMMISSION

File No. C-6714
Case No. 60

In the matter of the application of CENTRAL TRANSPORT, INC. for an extension of operations as a common carrier of property, intrastate.

At a session of the Michigan Public Service Commission held at its offices in the city of Lansing, Michigan, on the 9th day of January, 1990.

PRESENT: Hon. William E. Long, Chairperson
Hon. Steven M. Fetter, Commissioner
Hon. Ronald E. Russell, Commissioner

OPINION AND ORDER

* * *

III.

DISCUSSION

* * *

Finally, Central excepts to the ALJ's conclusion that Central's constitutional challenge to MCL 479.10a(6) is an issue for the courts to resolve and, therefore, should not be addressed in this case. However, consistent with our January 3, 1979 order in File No. L-11332, the Commission does not have the power, under the Constitution, to rule a statute unconstitutional. Only the courts have the power to find

legislative action unconstitutional. Therefore, the Commission declines to address Central's constitutional challenges

* * *

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ William E. Long
Chairperson

(SEAL)

/s/ Steven M. Fetter
Commissioner

/s/ Ronald E. Russell
Commissioner

By the Commission and pursuant to
its action of January 9, 1990.

/s/ Dorothy Wideman
Its Executive Secretary

APPENDIX P

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF MACOMB

File No. 89-3884-AW

UNIVERSAL AM-CAN, LTD.,

Plaintiff,

vs.

FRANK J. KELLEY, Attorney General of the State of Michigan, WILLIAM E. LONG, Chairperson of The Michigan Public Service Commission, STEVEN M. FETTER, Commissioner of the Michigan Public Service Commission, RONALD E. RUSSELL, Commissioner of the Michigan Public Service Commission, THOMAS R. LONERGRAN, Director of Motor Carrier Regulation of the Michigan Public Service Commission, and CAPT. ANTHONY PHILIPPS, Commander of the Motor Carrier Division of the Michigan State Police,

Defendants.

OPINION AND ORDER

This matter is before the Court on plaintiff's motion for a writ of mandamus and/or preliminary injunction as well as defendants' motion for summary disposition, or in the alternative, for change of venue.

Plaintiff filed this action, on September 22, 1989 via a complaint for preliminary and permanent injunction, mandamus, and declaratory judgment alleging the defendants had not enforced MCL 497.10(a)(6) which provides that only employees can operate vehicles, not independent contractors for many

years. Plaintiff alleges it attempted to add equipment to its fleet on September 8, 1989, tendered the fees but was informed it could no longer add equipment for use in Michigan intrastate commerce for the reason that plaintiff's drivers were not employees but independent contractors. Plaintiff argues the statute does not require drivers of carrier-owned equipment to be employees of the carrier, that Michigan Public Service Commission had announced it would interpret the statutory provision to allow independent contractors, that the procedure followed by defendants is unlawful and that the enabling legislation is unconstitutional.

In their motion for summary disposition, defendants argue this Court has no subject matter jurisdiction over matters which should be properly brought before the Michigan Public Service Commission and the Court of Appeals, that plaintiff failed to exhaust available administrative remedies and that this Court is constitutionally prohibited from issuing injunctive relief. Defendants also assert, in the alternative, that mandamus and injunctive relief is inappropriate.

Plaintiff argues this Court has subject matter jurisdiction under the constitution and statutes of Michigan and that constitutional questions can only be brought in court and not before the administrative agency.

The Court is satisfied summary disposition is appropriate not only because this Court lacks jurisdiction over an action challenging the validity of Michigan Public Service Commission action but also because plaintiff has failed to exhaust reasonable and available administrative remedies.

The Court is satisfied the Michigan Public Service Commission is vested with exclusive original jurisdiction to regulate motor carrier operations in intrastate commerce. MCL 460.6(1). Under MCL 462.26(1), any common carrier or other party in interest, being dissatisfied with any order of the Commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices, or services, may within thirty days from the issuance and notice of that order file an appeal as of right in the Court of Appeals. Under MCL 462.26(4) no injunction

shall issue except upon application to the Court of Appeals following notice to the Commission and a hearing. It is obvious from plaintiff's pleadings and brief that plaintiff seeks to challenge an action of the Michigan Public Service Commission, that is, the change in procedure to deny issuance of decals to operate motor vehicles in intrastate commerce until the carrier complies with the statutory requirement that drivers be employees of the carrier. A well established and exclusive administrative remedy was available to plaintiff but was not pursued. Instead plaintiff has filed this collateral attack in circuit court. Plaintiff seeks to bolster its position by arguing the underlying legislation relating to employees is unconstitutional. The Court is satisfied the mere assertion of a constitutional argument is insufficient to divest the Michigan Public Service Commission from jurisdiction. As is ably pointed out by defendants in their briefs, a constitutional challenge may be brought before the administrative agency and be preserved for adjudication in a court of law on appeal to the Michigan Court of Appeals.

Since the Court finds it has no subject matter jurisdiction over plaintiff's challenge to actions of the Michigan Public Service Commission and plaintiff has failed to exhaust its administrative remedies, summary disposition should be and the same hereby is GRANTED defendant pursuant to MCR 2.116(C)(4) and (7). As a result, the request for a preliminary injunction and/or a writ of mandamus need not be addressed. Plaintiff's complaint should be and the same hereby is DISMISSED with prejudice.

IT IS SO ORDERED.

/s/ FREDERICK D. BALKWILL
Circuit Court Judge

DATED: January 19, 1990.

cc:
Robert E. McFarland
Don L. Keskey/Richard M. Karoub

APPENDIX Q

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF MACOMB

File No. 89-3884-AW

UNIVERSAL AM-CAN, LTD.,

Plaintiff,

vs.

FRANK J. KELLEY, Attorney General of the State of Michigan, WILLIAM E. LONG, Chairperson of The Michigan Public Service Commission, STEVEN M. FETTER, Commissioner of the Michigan Public Service Commission, RONALD E. RUSSELL, Commissioner of the Michigan Public Service Commission, THOMAS R. LONERGRAN, Director of Motor Carrier Regulation of the Michigan Public Service Commission, and CAPT. ANTHONY PHILIPPS, Commander of the Motor Carrier Division of the Michigan State Police,

Defendants.

OPINION AND ORDER

This matter is before the Court on plaintiff's motion for rehearing pursuant to MCR 2.119(F).

Plaintiff seeks rehearing of the Court's Opinion and Order dated January 19, 1990 in which the Court held it has no subject matter jurisdiction over plaintiff's challenge to actions of the Michigan Public Service Commission. The Court found plaintiff had failed to exhaust its administrative remedies since it had not pursued remedies before the Michigan Public Service Commission to conclusion. The Court did not find the

assertion of a constitutional challenge to the underlying legislation persuasive because it appeared to the Court a constitutional challenge may be brought before the administrative agency and preserved for adjudication in a court of law on appeal to the Michigan Court of Appeals.

Plaintiff seeks rehearing on the ground the Michigan Public Service Commission has ruled definitively as recently as January 9, 1990 that it is without jurisdiction to consider the constitutionality of its own enabling legislation.

In order to obtain rehearing pursuant to MCR 2.119(F) the moving party must demonstrate a palpable error by which the Court and the parties have been misled and show that a different disposition of the motion must result from correction of the error. A motion which merely presents the same issues ruled upon by the Court will not be granted.

Plaintiff merely presents the same issues already ruled upon by the Court. The recent decision by the Michigan Public Service Commission in which it states it does not have the power to rule a statute unconstitutional is cumulative to authority previous cited by plaintiff. As with many questions of law, there is room for a difference of opinion as to whether the Michigan Public Service Commission is the appropriate venue to initiate constitutional claims relating to motor carrier enforcement or whether collateral attacks raising constitutional claims are appropriate in the various circuit courts. Plaintiff has not convinced the Court it has committed palpable error by determining the claim must first be preserved before the Michigan Public Service Commission and then be resolved by a Court of competent jurisdiction on appeal to the Michigan Court of Appeals. If the Michigan Public Service Commission takes enforcement action following the administrative proceeding its action is appealable to the Michigan Court of Appeals and plaintiff may adjudicate the question of whether the Michigan Public Service Commission is attempting to enforce an unconstitutional statute at that level. Independent collateral attacks upon Michigan Public Service Commission actions in the various circuit courts leads to a plethora of

litigation divorced from the administrative proceedings with which they are more properly associated.

For the reasons set forth above, plaintiff's motion for rehearing should be and the same hereby is DENIED.

IT IS SO ORDERED.

/s/ FREDERICK D. BALKWILL
Circuit Court Judge

DATED: March 7, 1990.

cc:
Robert E. McFarland
Don L. Keskey